(9)

No. 90-681

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BARBARA HAFER,
Petitioner,

v.

JAMES C. MELO, JR. and CARL GURLEY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ROBERT M. WEINBERG
ANDREW D. ROTH
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-681

BARBARA HAFER,

Petitioner,

v.

JAMES C. MELO, JR. and CARL GURLEY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") moves for leave to file the attached brief *amicus curiae* in support of respondents. Respondents have granted their consent to the filing of said brief. Petitioner has refused her consent. In support of this motion the AFL-CIO states as follows:

1. The AFL-CIO is a federation of 90 national and international unions with a total membership of approximately 13,000,000 working men and women; many of these workers, like the plaintiffs-respondents in the instant case, are employed in the public sector. These workers have a vital interest in being able to rely on 42 U.S.C. § 1983 for the vindication of their constitutional and statutory rights under federal law, both in their capacities as public employees and as members of the general public.

2. The arguments advanced by petitioner in this case —that state officials sued for damages in their personal capacities for the misuse of state office are not "persons" within the meaning of § 1983, and that such officials are in any event shielded from such personal liability by the Eleventh Amendment—would destroy the very right of action against state officials that Congress intended to create in enacting § 1983. The attached brief *amicus curiae* is primarily devoted to a detailed review of this Court's precedents showing that the result sought by petitioner would require the Court to overrule a long and unbroken line of decisions recognizing both the inapplicability of the Eleventh Amendment to § 1983 personal-capacity suits against state officials, and the congressional purpose to hold state officials personally liable in damages under § 1983 when such officials deprive other persons of their federal rights under color of state law.

3. Petitioner contends too that the drastic result she seeks is compelled by this Court's recent decision in *Will v. Michigan Dep't. of State Police*, 491 U.S. 58 (1989). As we also show in the accompanying *amicus curiae* brief, however, the *Will* Court did not purport to overrule, or provide any basis for overruling, the unbroken line of this Court's decisions noted above. *Will* only goes so far as to establish that Congress did not as a matter of statutory construction intend to subject the *State itself* to damages liability under § 1983. Where, as here, a § 1983 plaintiff seeks to hold a state official *personally* liable in damages for her official acts, *Will* is inapposite.

CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

ROBERT M. WEINBERG
ANDREW D. ROTH
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTION

STATUTES

CONGRESSIONAL DOCUMENT

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-681

BARBARA HAFER,

Petitioner,

v.

JAMES C. MELO, JR. and CARL GURLEY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The interest of the American Federation of Labor and Congress of Industrial Organizations in this case is set forth in the foregoing motion for leave to file this brief.

SUMMARY OF ARGUMENT

Petitioner seeks to press into her service the decision in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), as support for two propositions each of which has been rejected by this Court in a long line of unbroken decisions. Those propositions are (1) that a

state executive official performing state functions is not a "person" under 42 U.S.C. § 1983 when sued for damages *in her personal capacity*; and (2) that such a state official is in any event shielded from personal liability in a federal court § 1983 action by operation of the Eleventh Amendment.

I. *Will*, first of all, was a statutory case, *not* an Eleventh Amendment case. The Eleventh Amendment by its terms applies only to actions "against one of the United States." Following this plain language, this Court has repeatedly and consistently held that federal court suits against state officials *in their personal capacities* are not barred by the Eleventh Amendment. *See* pp. 5-7, *infra*. *Scheuer v. Rhodes*, 416 U.S. 232 (1974), is perhaps the most familiar and pertinent example. *Scheuer* held that the Eleventh Amendment imposes no bar on a § 1983 damages action seeking to hold the Governor of Ohio and other "high" state executive officials personally liable in damages for their official acts.

II. Petitioner's statutory argument is foreclosed by an even longer and equally unbroken line of this Court's precedents; again *Scheuer v. Rhodes*, *supra*, comes most readily to mind. *See* pp. 9-11, *infra*.

This Court has repeatedly recognized that *the very purpose* of Congress in enacting § 1983 was to create a vehicle through which persons deprived of their federal rights could obtain appropriate relief against the public officials responsible for that deprivation. *See* pp. 12-16, *infra*. *Scheuer* is particularly instructive because the Court there confirmed that even the "highest" state executive officers have no license to violate established federal rights without having to answer personally for their transgressions under § 1983.

Petitioner's statutory argument thus rests on the supposition that *sub silentio Will*, *supra*, overruled not only the cases explicitly recognizing the congressional purpose

to subject state officials as a class to personal liability under § 1983, but also the numerous other cases decided by this Court that are meaningless if such officials are not within the ambit of § 1983, such as the Court's personal immunity cases. *See* pp. 16-19, *infra*.

But as we show the *Will* Court did not purport to overrule, or provide any basis for overruling, these cases. *Will* only goes so far as to establish that Congress in enacting § 1983 did not intend to subject *the State itself* to damages liability, either by a direct action against the State or by an official-capacity action against a state official. *Will*, 491 U.S. at 64-71. Where, as here, a § 1983 plaintiff seeks to hold a state official *personally* liable in damages for her official acts, *Will* is inapposite. *See* pp. 19-21, *infra*.

III. Finally, implicit in petitioner's brief is the argument that if she is a "person" under § 1983 when sued for her official acts—which she plainly is—she is nevertheless entitled under the circumstances of this case to assert a defense of absolute immunity. *Scheuer v. Rhodes*, *supra*, however, explicitly rejected such a claim of absolute immunity by state executive officers, including the chief executive officer of the State. *Scheuer* is thus again dispositive. *See* pp. 23-25, *infra*.

Under *Scheuer* and its progeny, petitioner is, of course, entitled to assert a defense of *qualified* immunity. The qualified immunity defense afforded by this Court's precedents to state executive officials is broad in scope and hence more than adequate to address the public policy considerations raised by petitioner to the extent that those considerations have force. As the Court found in *Scheuer*, "§ 1983 would be drained of meaning" were the Court to hold state executive officials absolutely immune from damages liability under the statute. 416 U.S. at 248. *See* pp. 25-26, *infra*.

ARGUMENT

Section 1983 provides that:

> *Every person* who under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.* [42 U.S.C. § 1983 (emphasis added).]

In *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70-71 (1989), the Court held—as a matter of statutory construction—that *a State and a state official sued for damages in his official capacity* are not "persons" subject to suit under § 1983. *Will*, in other words, establishes that § 1983 can not be used to impose liability in damages on a State *qua* State, either by a direct action against the State or by an official-capacity action against a state official. *Id.*

Petitioner Barbara Hafer contends that *Will* also establishes that she may not be held *personally* liable in damages under § 1983 for her official actions as Auditor General of the Commonwealth of Pennsylvania that allegedly violated respondents' First Amendment rights. Petitioner contends that this result is compelled by *Will* "both as a matter of statutory construction and by application of the Eleventh Amendment [to the United States Constitution]." Brief for Petitioner ("Pet. Br.") at 9.

Petitioner's reading of *Will* would expand the reach of that case far beyond its holding and by so doing would place *Will* at odds with two well established lines of this Court's precedents. *Will*, first of all, was a statutory case, not an Eleventh Amendment case. Thus, *Will* was not intended to overrule the long line of this Court's precedents holding that § 1983 suits against state officials *in their personal capacities* are not barred by the Eleventh Amendment. Nor did *Will* purport to overrule, or provide any basis for overruling, the even longer line of this Court's precedents holding that § 1983 suits may be brought against state officials *in their personal capacities* for actions taken in the conduct of their offices.

Because it is important at the outset to show that this case does *not* implicate any *constitutional* question, we address petitioner's Eleventh Amendment argument first; we then proceed to analyze the issue of statutory construction presented.

1. (a) Petitioner relies on *Will* as support for her Eleventh Amendment argument. Pet. Br. at 8-9. But, as just noted, *Will* was a statutory and not an Eleventh Amendment case. *See Will*, 491 U.S. at 63-64 ("Petitioner filed the present § 1983 action in Michigan state court, which places the question whether a State is a person under § 1983 squarely before us since the Eleventh Amendment does not apply in state courts.").

The *Will* Court thus had no occasion to consider and hence did not even purport to consider whether the Eleventh Amendment shields state officials sued for damages in their personal capacities under § 1983. Petitioner, moreover, cites no Eleventh Amendment authorities in support of her position that the Amendment provides such a shield for state officials in these circumstances.

The absence of such authority is not surprising. The Eleventh Amendment by its terms has no application to this case. The Amendment provides in full:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against one of the United States* by Citizens of another State, or by Citizens or Subjects of any Foreign State. [emphasis added].

This is a suit for damages against a state official *in her personal capacity*. Thus, this is *not* a suit against "one

of the United States" within the meaning of the Eleventh Amendment. It bears emphasis, too, that because no recovery is sought from the state treasury through the artifice of suing petitioner *in her official capacity*, the State is *not* the real party in interest.

(b) Following the plain language of the Eleventh Amendment, this Court has repeatedly and consistently rejected the precise argument advanced by petitioner here, *viz.*, that the Eleventh Amendment bars a federal court § 1983 damages suit against a state executive official in his personal capacity. *Scheuer v. Rhodes*, 416 U.S. 232 (1974), is perhaps the most familiar example.

In *Scheuer*, the plaintiffs brought a § 1983 damages action in federal court against the Governor of Ohio and other state executive officers "seeking to impose individual and personal liability on the *named defendants*." *Id.* at 238 (emphasis in original). The Court emphasized the "well established" rule that the Eleventh Amendment is a bar to suit in federal court *only* when the State itself is the named defendant or the real party in interest. Conversely, where the plaintiff seeks to impose *personal* liability on a state official, the Eleventh Amendment does *not* come into play:

> [S]ince *Ex parte Young*, 209 U.S. 123 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. *Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." [416 U.S. at 237 (quoting *Ex Parte Young*, 209 U.S. at 159-60) (emphasis in original).]

See also Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 50 (1944) (official-capacity suit brought in federal court against state tax collector is barred by Eleventh Amendment since recovery is sought from state treasury; however, such an official-capacity suit "is plainly distinguishable [for Eleventh Amendment purposes] from those to recover personally from a tax collector money wrongfully exacted by him under color of state law"); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 462 (1945) ("Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally."); *accord Edelman v. Jordan*, 415 U.S. 651, 663-69 (1974); *Quern v. Jordan*, 440 U.S. 332, 345 n.17 (1979).

2. Petitioner's statutory construction argument that state officials may not be held personally liable in damages under § 1983 for their official actions is foreclosed by an even longer and equally unbroken line of this Court's precedents; again, *Scheuer v. Rhodes* is a particularly pertinent example.

(a) We pause to note that the breadth and implications of petitioner's statutory construction argument are somewhat unclear. Petitioner's bottom line position appears to be that "state officials" who act in their official capacities as employees of the State *as a class* are not "persons" under § 1983. Thus, says petitioner, such state officials may not be held personally liable in damages under the statute for such actions. *See* Pet. Br. at 10-13. This position, in turn, is derived from two separate lines of argument.

First, petitioner argues that since Congress out of solicitude for the unique constitutional status of the States did not intend to subject *the State itself* to dam-

ages liability under § 1983—as the Court held in *Will, supra*—Congress could not at the same time have intended to subject *state officials* who are critical to the functioning of state government to such liability. To impute such an intent to Congress, the argument goes, would mean that Congress was prepared in enacting § 1983 to impinge upon "the exercise by state officials of their authority and responsibility to manage the affairs of state government in an efficient and orderly manner," contrary to "the concepts of federalism implicit in the restrictions of the Eleventh Amendment." Pet. Br. at 9.

This line of argument would appear to be confined to that class of public officials *employed directly by the State* —and perhaps confined even further to those public officials holding "high" state office, however defined—to the exclusion of public officials employed by political subdivisions of a State, such as municipalities and school boards, that do not share in the States' Eleventh Amendment immunity.

Second, petitioner's brief, as we read it, makes the argument that it is somehow unfair or imprudent as a matter of public policy to subject state officials performing state functions to *personal* liability under § 1983, on the theory that an official is but an instrument of his governmental employer and should not be subject to *personal* liability when acting within the scope of his employment. Thus, petitioner argues that, as a matter of public policy, "[d]amages for alleged deprivation of civil rights should be payable, if at all, by the State, *not the official capacity actor*, and Congress has the power to enact [such] legislation." Pet. Br. at 20 (emphasis in original).

Petitioner's second argument, then, is, in essence, that the States should be subject to vicarious liability under § 1983 *to the exclusion of state officials*. This argument —though by its terms also limited to "state officials"— has broader implications than the first, and would as a matter of logic encompass *all* public officials acting "under

color of state law" within the meaning of § 1983, including municipal officials.

Whatever the precise contours of petitioner's statutory argument, that argument, as we now show, is foreclosed by the many cases in this Court that have recognized repeatedly that public officials who abuse the powers of their office are, as a class, the very "persons" Congress intended to reach when the Legislature enacted § 1983. Under this consistent line of authority, *all* such public officials are within the ambit of § 1983, and *all* such officials may in appropriate circumstances be held *personally* liable under the statute for their official acts that deprive other persons of the rights, privileges and immunities secured by the Constitution and laws of the United States.

(b) To the extent that petitioner seeks to carve out an exemption from § 1983 for state officials—or perhaps a more narrow exemption for "high" state officials—petitioner's position has been explicitly rejected by this Court in *Scheuer v. Rhodes, supra*. Indeed, in all pertinent respects, *Scheuer* is on all fours with the instant case.

As discussed earlier, *Scheuer* was a § 1983 suit for damages against the *chief executive officer* of the State of Ohio and other state executive officers in their personal capacities. The precise conduct challenged in *Scheuer* was the decision of Governor Rhodes and the other state defendants to deploy the Ohio National Guard to quell civil disturbances at Kent State University. *See* 416 U.S. at 235-36. There was no dispute in *Scheuer*—as there is no dispute here, *see* Pet. Br. at 14-15 & nn. 20-21—that in ordering the deployment of the National Guard, the defendants had acted in their official capacities as executive officers of the State of Ohio, and that those officials were being sued for damages in their personal capacities for their official acts.

In addition to asserting a right to absolute immunity from suit under § 1983 by operation of the Eleventh

Amendment—which the Court rejected, *see* pp. 6-7, *supra*—the *Scheuer* defendants also asserted a right to absolute "executive" immunity. 416 U.S. at 238. This absolute immunity claim was premised on the very arguments offered by petitioner here as to why she should not be subject to personal liability under § 1983 for actions taken in her official capacity as Auditor General of Pennsylvania. The *Scheuer* defendants stressed "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion," and "the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." 416 U.S. at 240.

Citing its earlier decision in *Monroe v. Pape*, 365 U.S. 167 (1961)—which held that Congress' intent in enacting § 1983 was to authorize suits for damages in federal court *against public officials* who abuse their public office in a manner that deprives other persons of their constitutional rights—the *Scheuer* Court rejected the state officials' immunity claim. The Court reasoned that to recognize such a blanket immunity from suit under § 1983 would be to "drain[] of meaning" (*id.* at 248), *Monroe*'s conclusion that public officials could be held personally liable in damages for their misuse of public office:

> [D]amages against individual defendants are a permissible remedy [under § 1983] in some circumstances notwithstanding the fact that they hold public office. . . . In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another.
>
> * * * *
>
> It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute. In *Monroe v. Pape, supra*, MR. JUSTICE DOUGLAS, writing

for the Court, held that the section in question was meant "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." 365 U.S., at 172. Through the Civil Rights statutes, Congress intended "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id.*, at 171-172.

Since the statute relied on thus included within its scope the " '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,' " *id.*, at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)), governmental officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms. [416 U.S. at 238, 243.]

Significantly in this regard, the *Scheuer* Court must have been proceeding on the assumption that a State is not a "person" under § 1983, as the *Will* Court later made explicit. At the time of *Scheuer* the Court had already held in *Monroe v. Pape*, *supra*, 365 U.S. at 187-92, that municipalities were not "persons" under § 1983. And if Congress had not intended § 1983 to reach municipalities, it follows *a fortiorari* that Congress could *not* have intended § 1983 to reach the State itself. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976); *see also Will*, 491 U.S. at 62, 70. *Will's* holding that the States *qua* States are not persons under § 1983 thus creates no new principle of law that warrants a reexamination of *Scheuer's* holding that a state official sued in his personal capacity *is* a person for § 1983 purposes.[1]

---

[1] In an effort to divorce this case from *Scheuer*, and to bring the case within *Will's* holding, petitioner frames her statutory argument in terms of whether she is a "person" under § 1983 when engaged in official acts, and not in terms of whether she is entitled to assert an

(c) Four years after *Scheuer*, the Court held in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-95 (1978), that municipalities *are* "persons" under § 1983, thus reopening the question of whether a State might also be a § 1983 "person." *See Will*, 491 U.S. at 61-63, 70. But while the status of public entities under § 1983 has been in flux, the *constant* has been that state and municipal *officials* are subject to personal liability under § 1983. Thus, the Court has recognized that the answer to the question whether a public *entity* is a "person" under § 1983 does not govern the answer to the question whether a public *official* sued in her personal capacity is a "person."

The reason is clear. *The very purpose* of Congress in enacting § 1983 was to create a vehicle through which persons deprived of their federal rights could obtain appropriate relief—whether it be damages or injunctive relief—against the public officials responsible for that deprivation. In this sense, *Scheuer* merely adds that even the "highest" state executive officers have no license to

---

absolute immunity defense. Petitioner's argument is thus in one sense broader than the state executive officials' argument in *Scheuer*. If state officials are not "persons" within the meaning of § 1983, they could *never* be held personally liable in damages in a § 1983 suit. In contrast, if such officials are "persons" who are nevertheless entitled to assert an absolute "executive" immunity defense, they *could* be held liable in appropriate circumstances, such as when performing "nonexecutive" functions, or when the immunity defense has been waived.

As we show in text, however, the Court's decision in *Scheuer* disposes of *any* claim that state executive officials cannot as a rule be held personally liable in damages under § 1983, whether that claim is framed in terms of the statutory "person" language, or in terms of an entitlement to absolute "executive" immunity. In this section of the brief, we have relied on *Scheuer* specifically to address petitioner's "person" argument. In Part 4, *infra*, we rely on *Scheuer* yet again to address the distinct argument, implicit in petitioner's brief, that even if she is a "person" under § 1983, she is entitled to absolute immunity under the circumstances of this case.

violate established federal rights without having to answer personally for their transgressions under § 1983.

The landmark decision of the Court on this issue—and the one directly relied upon by the Court in *Scheuer*—was *Monroe v. Pape, supra*. *Monroe* was a § 1983 suit for damages against 13 individual police officers and the City of Chicago. The police officers sued in *Monroe* were municipal officials—and not as in *Scheuer* state officials—and the issue before the Court was framed in terms of whether Congress had intended to create a remedy under § 1983 for an "official's" abuse of office, without regard to whether the official was employed by the State or by one of its political subdivisions:

> The question with which we now deal is . . . whether Congress, in enacting [§ 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. [365 U.S. at 172.]

The *Monroe* Court, after a thorough review of the statute's legislative history, found that § 1983's *raison d'etre* was to create a federal right of action against public officials—"those who carry a badge of authority of a State and represent it in some capacity" (*id.* at 172)—who misuse the power of their office to deprive persons of their federal rights, (*id.* at 174-87). Thus, for example, *Monroe* quotes the statement of Mr. Hoar of Massachusetts explaining the purposes of § 1983 as follows:

> Now, it is an effectual denial by a State of the equal protection of the laws *when any class of officers* charged under the laws with their administration permanently and as a rule refuse to extend such protection. If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, *and no verdict against them for their failure of duty can be obtained before a South Carolina jury*, the State of South Carolina, through the

> class of officers who are its representatives to afford the equal protection of the laws to that class of citizens, has denied that protection. [365 U.S. at 177 (emphasis added) (quoting Cong. Globe, 42d Cong., 1st Sess. 334).]

Indeed, in *Monroe*, the Court held that *only* the individual police officers who had been accused of violating the plaintiffs' constitutional rights—and *not* the municipality that employed those officers—are "persons" who could be held liable in damages under § 1983. *See* 365 U.S. at 187-92.

In *Monell*, *supra*, as we have noted, the Court reversed that portion of *Monroe* holding that municipalities are not § 1983 "persons." *See* pp. 11-12, *supra*. At the same time, the Court in *Monell reaffirmed* that Congress had unquestionably intended to bring public *officials* within the statute's sweep. Again canvassing the legislative history of § 1983, the Court observed that the legislative debates reflected that the statute could "without question . . . be used to obtain a damages judgment against state or municipal *officials* who violated federal constitutional rights while acting under color of law." 436 U.S. at 682 (emphasis in original). This fact, according to the Court, was apparent to "everyone" who participated in the legislative debates, "proponents and opponents alike." *Id.* at 700.

The Court has most recently had occasion to review § 1983's legislative history in *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989). The Court's conclusion there was the same: *viz.*, that § 1983 was designed specifically "'to expose state and local officials to a new form of liability.'" *Id.* at 723 (quoting *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 259 (1981)).

The congressional purpose to create a new federal remedy against public officials as a class is summarized with admirable clarity and conciseness by Justice White's

concurring opinion in *Imbler v. Pachtman*, 424 U.S. 409 (1976), which, like *Scheuer*, involved the issue of what immunity defenses are available to public officials in actions brought under § 1983:

> As the language [of § 1983] itself makes clear, the central purpose of § 1983 is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an *official's* abuse of his position." *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (emphasis added). The United States Constitution among other things, places substantial limitations upon state action, and the cause of action provided in 42 U.S.C. § 1983 is fundamentally one for "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). It is manifest then that all state officials as a class cannot be immune absolutely from damage suits under 42 U.S.C. § 1983 and that to extend absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create. *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974). [424 U.S. at 433-34.]

This congressional purpose is also aptly and succinctly stated in *Felder v. Casey*, 487 U.S. 131 (1988), where the Court held that a state statute requiring § 1983 plaintiffs to provide state and local officials and entities with notice of and an opportunity to cure alleged civil rights violations is preempted by federal law. The *Felder* Court found that:

> In enacting § 1983, Congress entitled those deprived of their civil rights to recover full compensation *from the governmental officials responsible for those deprivations.* A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance *from the very targets of the federal legislation*, is inconsistent in both purposes and effect with

> the remedial objectives of the federal civil rights law. [487 U.S. at 153 (emphasis added).]

In *Kentucky v. Graham*, 473 U.S. 159 (1985), the Court described at length the essential nature of personal-capacity suits against public officials under § 1983, and emphasized that such personal-capacity suits are distinct from those that might be brought against *the public entities* employing those officials:

> Personal-capacity suits seek to impose personal liability upon a governmental official for actions he takes under color of state law.
>
> * * * *
>
> On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. . . . When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law.
>
> * * * *
>
> A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him. [473 U.S. at 165-68 (emphasis in original) (citations omitted).]

(d) To conclude that state officials as a class are not "persons" under § 1983 would require the Court to overrule not only the cases previously discussed, including *Scheuer*, but also a long and unbroken line of other cases recognizing that state officials in their personal capacities are amenable to § 1983 damages suits.

Thus, for example, the Court has in a line of cases dating back over forty years sought to articulate the scope and nature of the immunity defense available to various state officials in personal-capacity suits brought under § 1983. A critical predicate underlying each of these cases is the recognition that Congress intended in enacting § 1983 to create a federal cause of action against

state officials. Obviously, had this point not been firmly-established and well-understood, the Court would never have had occasion in these cases to examine the *defenses* available to state officials sued for damages under § 1983. *See, e.g., Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators sued under § 1983 for actions in the legislative sphere may defend on basis of absolute immunity); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (state hospital superintendent sued under § 1983 for actions regarding incarcerated mental patient may defend on basis of qualified immunity); *Procunier v. Navarette*, 424 U.S. 555 (1978) (state prison officials sued under § 1983 for interfering with outgoing prisoner mail may defend on basis of qualified immunity); *Stump v. Sparkman*, 435 U.S. 349 (1978) (state judges sued under § 1983 for actions taken in the judicial sphere may defend on basis of absolute immunity); *Gomez v. Toledo*, 446 U.S. 635, 638-40 (1985) (plaintiff states cause of action for damages against superintendent of state police by alleging that state official—a "person"—deprived plaintiff of a federal right under color of state law; burden is then on state official to plead defense of qualified immunity); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734-37 (1980) (state judges sued under § 1983 for official, but non-judicial, acts may defend on basis of qualified immunity); *Davis v. Scherer*, 468 U.S. 183, 190-91 (1984) (state highway official does not lose qualified immunity if he is found to have violated the command of a state administrative regulation); *Malley v. Briggs*, 475 U.S. 334 (1986) (state trooper sued under § 1983 for actions taken in seeking arrest warrant may defend on basis of qualified immunity); *Forrester v. White*, 484 U.S. 219 (1988) (state judges sued under § 1983 for non-judicial employment decisions may defend on basis of qualified immunity); *cf. Owen v. City of Independence*, 445 U.S. 622, 638 n.18, 650-58 (1980) (justifications found in *Scheuer* and its progeny for affording state and municipal officials a qualified im-

munity from suit under § 1983 do not apply in suits against municipalities).

Similarly, in *Smith v. Wade*, 461 U.S. 30 (1983), the Court held that a state corrections officer could be held liable for *punitive* damages under § 1983 for egregious conduct violating the federally protected rights of others. Like the Court's immunity decisions, the decision in *Smith v. Wade* is inexplicable absent the recognition that state officials are "persons" under § 1983 who may in appropriate circumstances be held personally liable in damages.

Many other decisions of this Court are predicated on the same recognition. *See, e.g., City of Greenwood v. Peacock*, 384 U.S. 808, 829-30 (1966) (although civil rights demonstrators may not remove state criminal prosecutions to federal court based on allegations of race discrimination, they are not without a remedy under federal law; "officers of a State who violate the petitioners' federal constitutional and statutory rights . . . may be made to respond in damages [under § 1983]"); *Wolff v. McDonnell*, 418 U.S. 539, 554-55 (1974) (state prisoner deprived of good-time credits by state corrections official is entitled to bring § 1983 damages action against that official); *Robertson v. Wegmann*, 436 U.S. 584, 592 (1978) (application of state survivorship statute that operates to extinguish § 1983 damages action upon the death of the plaintiff will not undermine the deterrent effect of § 1983, because "[a] state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him"); *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982) (persons involuntarily incarcerated in state mental hospital may recover damages against state official in his personal capacity for failure to provide minimally adequate training).

Finally, to the extent that petitioner's argument extends to *municipal* officials in addition to state officials, *see* pp. 8-9, *supra*, many other decisions of this Court recognizing the amenability of municipal officials to § 1983

damages actions, including *Monroe v. Pape*, *supra*, would have to be reexamined. *See, e.g., Pierson v. Ray*, 386 U.S. 547 (1967) (municipal judge sued for damages under § 1983 may assert absolute immunity for acts taken in his judicial capacity, but local police officers may assert only qualified immunity); *Carey v. Piphus*, 435 U.S. 247, 264-67 (1978) (public school officials sued for damages under § 1983 for alleged violation of procedural due process may be held liable only for nominal damages absent proof of actual injury); *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (although plaintiff subjected to a "chokehold" by Los Angeles police officers in alleged violation of his constitutional rights may not seek prospective relief against future violations, "[i]f [plaintiff] has suffered an injury barred by the Federal Constitution, he has a remedy for damages under § 1983"); *Memphis Community School District v. Stachura*, 477 U.S. 299, 310 (1986) (in assessing compensatory damages against individual school board members and administrators in action brought under § 1983, jury may not be instructed to consider the abstract "value" or "importance" of the constitutional rights at issue); *Howlett v. Rose*, —— U.S. ——, 110 S. Ct. 2430, 2444 (1990) (state court has jurisdiction over § 1983 damages action against individual school board officials and thus "is fully competent to provide the remedies the federal statute requires").

3. (a) Against this unbroken line of authority, petitioner places total reliance on language from *Will*, *supra*, that is taken out of context. *See* Pet. Br. at 12-13. As noted earlier, the principal issue before the Court in *Will* was whether *the State itself* is a "person" under § 1983. The Court in *Will* answered this question in the negative. In so doing, the Court relied on a number of factors, including the awkwardness of reading the term "person" as used in § 1983 to include the States, the fact that Congress enacted § 1983 to provide a federal forum for civil rights actions while cognizant of the principle that

the States are immune from suit in federal court under the Eleventh Amendment, and the legislative history of § 1983, which gives no indication that Congress contemplated damages suits against the State itself. *See* 491 U.S. at 64-69.

These factors provide no support to petitioner's contention *that state officials sued in their personal capacities* are not "persons" under § 1983. First, there is obviously no awkwardness in reading the statutory term "person" to include state officials sued in their personal capacities; indeed, a contrary conclusion would be quite remarkable. Second, Congress could not have thought when it enacted § 1983 that state officials were immune from suit in federal court under the Eleventh Amendment. *See* Part 1, *supra*. Third, as the Court observed in *Will*, the legislative history affirmatively shows that Congress contemplated damages suits against state officials in their personal capacities. *See Will*, 491 U.S. at 68; *see also* pp. 13-14, *supra*.

The Court did hold in *Will* that state officials *sued for damages in their official capacities* are not "persons" within the meaning of § 1983. This holding, however, was nothing more than a reaffirmation of the Court's judgment that Congress did not intend to subject *the State itself* to liability in damages under § 1983:

> Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471 (1985). As such, it is no different from a suit against the State itself. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985); *Monell, supra*, at 690, n.55. We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device. [491 U.S. at 71.]

A suit against a state official in her *personal* capacity is not a suit "against the State itself," *see Kentucky v. Graham, supra*, 473 U.S. at 165-66, and nothing in *Will* can fairly be read to suggest that a state official is not a "person" when sued in that capacity.

Because she cannot rely on the holding or the reasoning of *Will*, petitioner seizes on the last sentence of the Court's opinion, where the Court summarized its holding in the following words: "We hold that neither a State nor its officials *acting* in their official capacities are 'persons' under § 1983." 491 U.S. at 71 (emphasis added). In context, however, it is clear that the Court did not mean to imply that § 1983 does not authorize suits against state officials in their *personal capacities* for their official actions. That issue was not even before the Court in *Will*, and there is no reason to suspect that the Court intended *sub silentio* to overrule dozens of its precedents —dating back more than thirty years—recognizing that state officials may be held personally liable in damages under § 1983 for their official actions that violate other persons federal rights.[2]

(b) Ultimately, petitioner's statutory construction argument reduces to the proposition that States (and, presumably, municipalities as well) should as a matter of

---

[2] Equally without merit is petitioner's complaint that to allow personal capacity suits against state officials for their official actions would run afoul of the Court's admonition in *Will* that congressional intent should not be circumvented through a mere pleading device. *See* Pet. Br. at 18. This complaint misses the point of *Kentucky v. Graham, supra*, that personal-capacity and official-capacity suits are two entirely distinct forms of actions seeking recovery against different parties. *See* 473 U.S. at 165-68, *quoted* at p. 16, *supra*. In choosing to sue a state official in his or her personal capacity, a § 1983 plaintiff is not seeking to avoid the holding in *Will* (or any other case for that matter) through a mere pleading device. Rather, the plaintiff is bringing a lawsuit against an entirely distinct party in which judgment may be secured and executed only against the official's personal assets. *Id.* at 162, 166.

public policy be held vicariously liable for the constitutional torts of their officials, and that such vicarious liability should *displace* the individual responsibility of officials for their tortious conduct. However that may be, the Congress that enacted § 1983 made the *contrary* policy judgment to hold public officials personally liable in damages when they violate other persons' federal rights. *See* pp. 9-16, *supra*. This Court is without power to override that policy judgment. *See Tower v. Glover*, 467 U.S. 914, 922-23 (1984) ("We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate."); *Malley v. Briggs*, *supra*, 475 U.S. at 342 ("We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice . . . .").

Indeed, given the congressional intent to incorporate tort law principles in § 1983, Congress could not have been expected to make the policy judgment here advocated by petitioner. Holding state officials personally liable for their official acts that violate federal rights is fully consistent with the bedrock tort law principle that "a man [is] responsible for the natural consequences of his actions." *Monroe v. Pape*, *supra*, 365 U.S. at 187.[3] Under traditional tort law principles, the doctrine of *respondeat superior* may be applicable in appropriate circumstances "to broaden" the liability of the individual tortfeasor "by imposing it upon an additional, albeit innocent, defendant." *Prosser and Keeton on the Law of Torts*, Chp. 12, at 499 (5th ed. 1984). However, in no sense does such *respondeat superior* liability *displace* the primary liability of the individual tortfeasor:

> A corporate officer is individually liable for the torts he personally commits and cannot shield himself behind a corporation when he is an actual participant in the tort. . . . The fact that an officer is acting for a corporation also may make the corporation vicariously or secondarily liable under the doctrine of respondeat superior; it does not however relieve the individual of his responsibility. [*Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978) (citations omitted); *accord United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 744 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Pollution Abatement Services*, 763 F.2d 133, 135 (2d Cir. 1985), *cert. denied*, 474 U.S. 1037 (1985); *A & M Records, Inc. v. M. V. C. Distributing Corp.*, 574 F.2d 313, 315 (6th Cir. 1978).]

[3] *Cf. Westfall v. Erwin*, 484 U.S. 292, 295 (1988) ("absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct").

4. Implicit in petitioner's brief is the argument that if she is a "person" under § 1983 when sued in her personal capacity for her official acts—which, we have shown, she plainly is—she is nevertheless entitled under the circumstances of this case to assert a defense of absolute immunity. *See* n.1, *supra*. *Scheuer v. Rhodes*, *supra*, however, expressly forecloses any such assertion of absolute immunity.

As noted earlier, the public policy considerations invoked by petitioner in support of her claim of absolute immunity are the very same considerations invoked by the Governor of Ohio and the other state executive officials in *Scheuer*. *See* p. 10, *supra*. Under *Scheuer* and its progeny, however, such an absolute immunity defense will be recognized only when the public policy considerations supporting such a defense at common law are so overwhelming as to make reasonable the inference that Congress could not have intended to render such a defense unavailable when, in enacting § 1983, the Legislature created a federal cause of action against "every person" who under color of state law deprives another person of federal rights.[4] Petitioner has utterly failed to explain

[4] *See, e.g., Scheuer*, 416 U.S. at 243-45; *Imbler v. Pachtman*, *supra*, 424 U.S. at 434 (White, J. concurring) ("there are certain

why the considerations she identifies should lead to the recognition of absolute immunity in the circumstances of this case when these considerations were held insufficient to warrant such an immunity in *Scheuer*.

Nor is it significant, as petitioner suggests, that the specific actions giving rise to this lawsuit were employment decisions—a species of official action that petitioner regards as especially crucial to the proper functioning of state government. *See* Pet. Br. at 19. The proposition that such employment decisions by the Auditor General of Pennsylvania were more critical to the State and its citizenry than the decision of the Governor of Ohio to send the National Guard to Kent State University cannot bear inspection. Yet the Court in *Scheuer* held that absolute immunity from suit under § 1983 could not attach to the Governor's decision.

Of at least equal significance, this Court in *Forrester v. White, supra*, held that a state judge could be held liable in damages under § 1983 for his non-judicial employment decisions, even if he would enjoy absolute immunity for his judicial decisions. Thus, *Forrester* has laid to rest any possible contention that employment decisions by state officials are somehow unique in entitling the state decisionmaker to absolute immunity from suit under § 1983:

> [A] judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other Executive Branch official who is responsible for making such employment decisions. Such decisions, like personnel decisions made by judges, are often crucial to the efficient

absolute immunities so firmly rooted in the common law and supported by such strong policy reasons that the Court has been unwilling to infer that Congress meant to abolish them in enacting 42 U.S.C. § 1983"); *Forrester v. White, supra*, 484 U.S. at 224, 229-30.

> operation of public institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983. [484 U.S. at 229.]

Significantly, in asserting a right to absolute immunity from suit under § 1983, petitioner fails even to acknowledge that under *Scheuer* and its progeny she is already entitled to assert a *qualified* immunity defense. The availability of such a qualified immunity defense is more than adequate to address the public policy considerations raised by petitioner to the extent that those considerations have force. The qualified immunity defense available to state executive officials has evolved since *Scheuer* to the point where such officials can be held liable in damages under § 1983 only where their conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known"; and summary judgment prior to discovery is readily available to weed out "insubstantial claims." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[5] As such, the defense, in the Court's words, "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs, supra*, 475 U.S. at 341.

As this Court has previously found, the recognition of an even greater immunity from suit under § 1983—*viz.*, an absolute immunity—would serve to defeat the complementary congressional goals of deterring constitutional and statutory violations by state officials and compensating the victims of unlawful conduct when deterrence has failed.[6] In this light, petitioner's complaint that state

[5] Although *Harlow* involved claims against federal executive officials under *Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971), and not claims against state executive officers under § 1983, the Court applies the same immunity principles in both contexts. *See, e.g., Harlow*, 457 U.S. at 809, 818 & n.30; *Malley v. Briggs, supra*, 475 U.S. at 335 n.2.

[6] *See, e.g., Forrester v. White, supra*, 484 U.S. at 223 ("To the extent that the threat of liability [under § 1983] encourages [state] officials to carry out their duties in a lawful and appropriate manner,

executive officers will be compelled "to hesitate" in conducting the affairs of state government if they are not held absolutely immune from damages suits under § 1983, Pet. Br. at 19, is particularly misplaced. As this Court observed in *Harlow*, *supra*, in fashioning the test for the defense of qualified immunity,

> [w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, *he should be made to hesitate*; and a person who suffers injury caused by such conduct may have a cause of action. [457 U.S. at 819 (emphasis added).]

CONCLUSION

For the foregoing reasons the decision of the court below should be affirmed.

Respectfully submitted,

ROBERT M. WEINBERG
ANDREW D. ROTH
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

---

and to pay their victims when they do not, it accomplishes exactly what it should."); *Gomez v. Toledo*, *supra*, 446 U.S. at 638-39 (section 1983 "reflects a congressional judgment that a 'damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees' ") (quoting *Owens v. City of Independence*, *supra*, 445 U.S. at 651); *Scheuer*, *supra*, 416 U.S. at 248 (section 1983 "would be drained of meaning" were the Court to hold that state executive officers are absolutely immune from suit under the statute).